BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ARTHUR A. BUTLER	)	
Claimant	)	
	)	
VS.	)	
	)	
JET T.V.	)	
Respondent	)	Docket No. 106,194
	)	
AND	)	
	)	
AMERICAN STATES INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the October 24, 2003 Order and respondent and its insurance carrier appealed the November 4, 2003 Post Award Medical Order and Order Nunc Pro Tunc entered by Administrative Law Judge (ALJ) Brad E. Avery. The Appeals Board (Board) heard oral argument on April 6, 2004.

APPEARANCES

Steven M. Tilton and Scott L. Johnson of Topeka, Kansas, appeared for claimant. Matthew S. Crowley of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record in this request for medical benefits is listed in the July 1, 2003 Post Award Medical Order, together with the transcript of proceedings for the October 16, 2003 Post Award Hearing and the exhibits attached thereto.

ISSUES

This is a post-award request for assisted living at a care facility where claimant would receive help with tasks of daily living including meal preparations, bathing and laundry. After conducting a hearing on October 16, 2003, Judge Avery entered the November 4, 2003 Post Award Medical Order and Order Nunc Pro Tunc which provided:

> The respondent and its insurance carrier are ordered to provide the cost equivalent of a studio apartment at Brighton Garden Assisted Living Facility until further order. If claimant desires a one bedroom apartment he may acquire such by paying the difference between the studio and one bedroom apartment. Costs [are] assess[ed] to the respondent for Ms. Erlandson's assessment per K.S.A. 44-516.
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> It was the intent of the court to secure for the claimant an assisted living facility that would provide for claimant's current needs at the minimum cost to the respondent. Apparently, this would require what has been designated as "Service Level Three." That is the level of service respondent and its insurance carrier are ordered to provide.
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> The need for "extra baths," if any, was not addressed in the post award proceedings but rather raised as a question in a letter, which was part of an exhibit attached to the testimony of Ms. Erlandson. Therefore, the request that the respondent provide for "extra baths" is denied. [1]

Respondent and its insurance carrier contend Judge Avery erred. Respondent and its insurance carrier agree that claimant should be placed into an assisted living facility. But they contend the ALJ erred by failing to determine what portion of the costs of the assisted living facility should be considered reasonable and necessary medical expense for which they are responsible. Accordingly, respondent and its insurance carrier request this Board to reverse the October 24, 2003 Order and the November 4, 2003 Post Award Medical Order and Order Nunc Pro Tunc and to deny claimant's request for assisted living. In addition, respondent and its insurance carrier contend the ALJ exceeded his jurisdiction in ordering respondent and its insurance carrier to pay the cost for the testimony of Debra Erlandson.

Conversely, claimant argues the Post Award Medical Order and Order Nunc Pro Tunc should be affirmed. Claimant argues the ALJ was correct not to apportion the costs between medical and non-medical expense in an assisted living facility as such apportionment is not appropriate. Claimant contends that the expenses that respondent and its insurance carrier label as non-medical items should be considered medical expenses in the context of this claim. Claimant further argues that the ALJ was correct to

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[1] Post Award Medical Order and Order Nunc Pro Tunc (Nov. 4, 2003).

order respondent to reimburse claimant for the cost of presenting the live-witness testimony of Ms. Erlandson because claimant did so at the ALJ's request.

The issues before the Board on this appeal are:

1. Did the ALJ err in ordering respondent and its insurance carrier to pay all of the costs associated with claimant's placement in an assisted living facility?

2. Did the ALJ exceed his jurisdiction in ordering respondent and its insurance carrier to pay the costs associated with Debra Erlandson's testimony?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was injured on September 14, 1981, while at work as the manager of the Jet T.V. Rental Store in Topeka, Kansas. Claimant was shot five times by a gunman. Although a motive for the shooting was never determined, it was found to have arisen out of the employment, presumably as an attempted robbery.[2] Claimant suffered injuries to his heart, lungs and spinal cord. He has lost the use of his lower extremities, has respiratory and heart problems, and has urinary and bowel dysfunction.

Although claimant has been able to live independently with certain modifications to his residences and van, claimant and his physicians now believe that it is necessary for him to be placed in an assisted living facility. There is no dispute that this placement is medically necessary and is a direct result of his work-related injuries. The only dispute concerns whether all the costs associated with the placement should be borne by respondent and its insurance carrier or whether, instead, some of those costs should be apportioned to claimant.

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. [3]

There is no question but that claimant's need for placement in an assisted living facility is directly attributable to the compensable injuries he suffered in connection with this claim. K.S.A. 44-510h(a), requires that employers provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury."

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[2] *Butler v. Jet T.V.,* Order, 86 CV 391 Shawnee County, Ks (June 27, 1986).

[3] K.S.A. 44-501(a).

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.[4]

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has held that what may not constitute medical treatment in one context, may in another. In *Hedrick v. U.S.D. No. 259* the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant's injury had resulted in paraplegia its holding might have been different.[5] The Board concludes that although an apportionment was appropriate while claimant was living on his own and receiving out patient services, now that it is medically necessary that he be placed in an assisted living facility there should be no apportionment.[6] The Board finds the placement to be medical treatment. There is no provision for apportioning medical treatment between an injured worker and the employer in the Kansas Workers' Compensation Act. [7]

As noted above, K.S.A. 44-510h(a) requires that he be provided such medical treatment as is "reasonably necessary" to treat and relieve the effects of those injuries. The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.[8] K.S.A. 44-510i provides additional guidance concerning medical benefits, including a schedule of maximum fees which "shall be reasonable, shall promote health care costs containment and efficiency with respect to the workers compensation health care delivery system, and shall be sufficient to ensure availability of such reasonably necessary treatment, care and attendance to each injured employee to cure and relieve the employee from the effects of the injury."[9] The December

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[4] K.S.A. 44-510h(a).

[5] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

[6] *Cf.* 5 *Larson's Workers' Compensation Law* § 94.03 [4][d] (2003).

[7] K.S.A. 44-501 *et. seq.*

[8] *See Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985); *Harris v. Bechtel-Dempsey-Price*, 160 Kan. 560, 164 P.2d 89 (1945); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935); *Dinkel v. Graves*, 10 Kan. App. 2d 604, 706 P.2d 470 (1985).

[9] K.S.A. 44-510i(c)(1).

1, 2003 edition of the Kansas Workers Compensation Schedule of Medical Fees provides the following "Ground Rules and Fees" for nursing homes and intermediate care facilities:

> 1. General: Reimbursement for nursing homes or intermediate care facilities will be limited to their usual and customary charge, less 10%. Workers Compensation patients should not be charged a fee that is higher than that of privately insured patients.
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> 2. Prior Authorization: Prior Authorization from the employer (or insurance carrier) is required before admission to a nursing home or intermediate care facility.
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> 3. Physician Charges: All physician charges, regardless of the setting or location in which the services were provided, are subject to the limits of this fee schedule. All physician billings must be submitted on the CMS (formerly HCFA) 1500 form (or an equivalent form) containing the same information.
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> 4. Cost Containment: Nothing in this section shall preclude an employer (or insurance carrier) from entering into payment agreements with nursing homes or intermediate care facilities to promote the continuity of care and the reduction of health care costs. Such payment agreements, if less, will supersede the limitation amounts specified herein. [10]

The Kansas Workers' Compensation Schedule of Medical Fees makes no mention of covered versus non-covered services, nor any provision for apportioning the costs of nursing homes or intermediate care facilities. The Board finds that it is the law and policy of this state not to apportion nursing home and intermediate care facility costs as respondent and its insurance carrier request; based upon a determination of what costs constitute the ordinary expenses of living separate and apart from the other services provided in those facilities. As it is not disputed that claimant's placement in the assisted living facility is medically necessary, respondent and its insurance carrier are responsible for the full costs of the placement subject to the pricing guidelines in the medical fee schedule.

Next, respondent and its insurance carrier contend that the ALJ exceeded his jurisdiction in ordering payment in the amount of $681.24 for the expert witness fee charged and expenses incurred by Ms. Erlandson for appearing and testifying at the October 16, 2003 hearing before Judge Avery. In his November 4, 2003 Post Award Medical Order and Order Nunc Pro Tunc, Judge Avery assessed to the respondent and its insurance carrier the costs for Ms. Erlandson's appearance and testimony at the October 16, 2003 hearing. That testimony was in connection with Ms. Erlandson's investigation and report performed pursuant to the July 1, 2003 Post Award Medical Order, which provided in part:

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[10] Kansas Workers Compensation Schedule of Medical Fees at 314 (Dec. 1, 2003).

> The court finds that the natural and probable consequence of claimant's work related accident requires that he be provided assisted living by the respondent and its insurance carrier. Because the court has been presented with a number of alternatives regarding claimant's needs, and the court does not have direct contact with the claimant, the court appoints Debra Elandson [sic], medical case manager, to make a recommendation to the court regarding the placement of Mr. Butler into as assisted living facility. Before making said recommendation, Ms. Elandson [sic] may consult the court, Mr. Butler and any parties she deems necessary. Any assisted living facility in which Mr. Butler is placed should provide adequate care for claimant's incontinence problem, meal preparation, bathing and laundry.
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> The recommendation shall be made available to the court and the parties within 30 days of this order with extensions for good cause.
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> All costs, including Ms. Elandson's [sic] fee, if any, concerning the placement of Mr. Butler are to be paid by the respondent and its insurance carrier. Mr. Crowley is directed to refer the [sic] Ms. Elandson [sic] to the court.[11]

Ms. Erlandson appeared at the hearing, not at the request of either party, but at the ALJ's request.[12] Although Judge Avery cited K.S.A. 44-516 as the basis for assessing costs against respondent and its insurance carrier, the Board finds that the ALJ's authority comes from K.S.A. 44-551(b)(1) which provides in part:

> Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, **and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges**.[13]

It is implicit within this authority conferred upon the ALJ by the Act, that the ALJ has the authority to assess the costs to a party or parties. The ALJ did not exceed his authority nor did he abuse his discretion in ordering respondent and its insurance carrier to pay the costs associated with Ms. Erlandson's appearance and testimony at the hearing. The Board agrees that it is appropriate for respondent and its insurance carrier to bear this cost which was incurred in connection with the administration of the Workers's Compensation Act.

After reviewing the record and after considering the parties' arguments, the Board finds and concludes that the ALJ's orders should be affirmed.

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[11] Post Award Medical Order at 1 and 2 (July 1, 2003).

[12] Letter from Brad E. Avery to Steven Tilton and Matthew Crowley (Sept. 19, 2003).

[13] K.S.A. 44-551(b)(1) (emphasis added).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the October 24, 2003 Order entered by Administrative Law Judge Brad E. Avery as corrected by his November 4, 2003 Post Award Medical Order and Order Nunc Pro Tunc is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven M. Tilton and Scott L. Johnson, Attorneys for Claimant
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director